No. 13,503

IN THE

United States Court of Appeals

For the Ninth Circuit

GIULIO PARTICELLI, *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	
ESTATE OF ELETTA PARTICELLI, Deceased, Arthur Guerrazzi, Executor, *Petitioner*, vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	

On Review of The Tax Court of the United States.

PETITIONERS' OPENING BRIEF.

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STATEMENT AS TO JURISDICTION.

This case was instituted by petitions filed in the Tax Court within ninety days of the date on which the deficiency letters were mailed. (R. 9, 22, 25, 31, 33.) As Eletta Particelli had died a few days previous to the execution of the petition, it was verified, as required by the rules of the Tax Court, by the person named as executor in her will. (R. 30-31.) After his formal qualification as executor, a motion to confirm was granted (R. 35), and the title of the case was changed by order of the Tax Court (R. 34). After hearing on the merits, decisions of the Tax Court were entered on May 1, 1952, finding a deficiency in income and victory tax in each case of $50,135.36 for the taxable year 1943. (R. 80, 81.) Petitions for review by this Court were filed on July 21, 1952, and served on July 23, 1952 in each case. (R. 84, 85, 88, 89.) An order consolidating the two cases was entered by this Court on August 1, 1952 (R. 91), pursuant to stipulation of the parties (R. 90). The jurisdiction of this Court is founded on Sections 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The relevant facts found by the Tax Court, stipulated to, or established by uncontradicted evidence not rejected by the Tax Court, may be summarized as follows:

Petitioner Giulio Particelli[1] is a resident of Sebastopol, California. (R. 59.) He was born in Italy in 1891. He cannot read English, and while he both speaks and understands it, his spoken English is a somewhat broken dialect which those not accustomed to it find difficult to understand. (R. 60.)

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[1] The other petitioner had no part in the facts, being involved only because of her community property interest. (R. 59.) For that reason, we shall hereinafter refer to Giulio Particelli as "petitioner".

Petitioner dealt in wine. Shortly after the repeal of Prohibition he began making wine on a small scale on his farm, and his operations grew until in 1941 he began and in 1943 completed the construction of a new and larger winery at Forestville, California. (R. 60.) The winery was equipped to crush grapes and ferment the juice into wine, to rack, filter and store 256,000 gallons of wine, but not to finish it. In addition, about 300 feet away from the winery petitioner had a bottling plant and retail store, where he bottled and sold wine of his own vintage as well as better grades of wine purchased from other wineries. (R. 60-61.)

Prior to the completion of the 1943 crush in November of that year, he sold wine of his own vintage for prices ranging from 32 cents a gallon when sold in 50-gallon containers to 38 cents a gallon in 5-gallon containers. This price included federal and state alcoholic beverage taxes totalling 11 cents a gallon. (R. 61.) Petitioner's 1943 crush was begun in September and completed in November of that year. It totalled 245,000 gallons and was added to that which he had on hand from his 1942 crush. The cost of the 1943 crush was from 50 cents to 52 cents a gallon. (R. 61.) This cost exceeded the ceiling price of 28 cents a gallon before taxes which petitioner was permitted to charge for bulk sales of wine of his own production (R. 65), because petitioner and other wine producers had expected that OPA would increase the ceilings by the added 1943 grape costs (R. 61-62). This the OPA did not do. (R. 316, 441.)

Petitioner could not obtain the higher ceiling price allowed for bottled goods unless he could finish his wine, because if bottled before being finished it would cloud and spoil. He was unable to finish his wine, and the winery which had on occasion finished his wine for him before refused to do so again. (R. 62.) After the 1943 crush petitioner was indebted to the Bank of Sonoma County for $70,000. (R. 62.)

Wine was in great demand (R. 62-63), and ceiling prices varied widely (R. 72). To illustrate this, petitioner's ceiling was 28 cents a gallon before tax (R. 65), whereas Tiara Products Company, Inc., the purchaser from petitioner, had a ceiling for wine of that sort of $1.10-$1.25 a gallon on bulk sales and a ceiling on bottled sales which returned it $2.00 a gallon net (R. 599-600, 620). This situation caused bulk sales of wine virtually to disappear, except where sold with the winery in which the wine was stored. (R. 63.)

In December, 1943, John Dumbra approached petitioner on behalf of his principal, Tiara Products Company, Inc., of New York, with an offer to buy four cars of his wine. Petitioner's reply was that he could not make a profit on sales of wine in such quantities. (R. 64.) In making this remark, petitioner had in mind his cost of production of about 50 cents a gallon and his ceiling price of 28 cents a gallon (R. 73, footn.), and Dumbra so understood (R. 581), although petitioner's ceiling price was not actually discussed (R. 64). Dumbra testified that petitioner then stated that "he would consider selling all of the wine and the winery together, because he wanted to get out of business". (R. 573; and see R. 73.) Petitioner then offered to sell his wine and winery for $350,000. Dumbra did not accept this offer but made a counter-offer of

$330,000, subject to the approval of his principal. (R. 64.) Dumbra then telephoned his brother, Victor Dumbra, president of Tiara Products Company, Inc., who was in New York, and obtained his authorization to go up to $350,000, if necessary. (R. 575-576.) Later Dumbra told petitioner he would pay $350,000 (R. 576), and Dumbra testified that petitioner then told Dumbra to meet him in his lawyer's office in San Francisco the next day or so, when he would have the written contract prepared (R. 576-577; R. 65). In that same conversation, petitioner told Dumbra the contract would specify one price for the wine and another for the winery, and Dumbra agreed (R. 65, 577.)

The two men met in the office of petitioner's accountant in San Francisco a day or so later. (R. 65.) This accountant was a certified public accountant and a partner in one of the large national accounting firms. (R. 261-262.) He had advised petitioner previously that in a sale of wine and winery he would have to sell the wine at the price ceiling established by the OPA for the bulk sale of wine. (R. 264.) The attorney who prepared the written contract of sale had previously advised petitioner not to sell at a price in excess of any ceiling. (R. 397.) At petitioner's request, the accountant, at this meeting in his office, computed the ceiling applicable to the sale at 28 cents a gallon, and so advised petitioner. (R. 65, 264-265.) The attorney was then called in to prepare the sales agreement, which he did pursuant to instructions he received from petitioner in John Dumbra's presence. (R. 398.) Petitioner and John Dumbra then signed the written contract. (R. 65, 269.)

The written contract appears in full in the record, as Exhibit A-1 to the stipulation of facts. (R. 45-46.) It is a written agreement to buy and sell a winery complete with equipment for $273,000, and 275,000 gallons of wine for $77,000. The contract expressly excludes from its terms a bottling plant owned by petitioner.

Fifteen days after the contract was signed, the purchaser, Tiara Products Company, Inc., delivered to the escrow agent two separate escrow instructions. (Exh. B-2, R. 46-47; Exh. D-4, R. 48-50.) One of them instructed the agent to deliver $77,000 to petitioner on its receipt from him of a bill of sale to 256,000 gallons of wine stored in petitioner's winery and 19,000 gallons stored elsewhere. (Exh. B-2, R. 46-47.) The other instructed the agent to pay $268,000 (the balance on $273,000 after deducting a $5,000 deposit) to petitioner on its receipt from him of the deed to the winery and bill of sale to the equipment. (Exh. D-4, R. 48-50.) Petitioner delivered two separate escrow instructions to the agent, which were similar to the buyer's instructions. (Exh. E-5, R. 50-51; Exh. F-6, R. 51.)

After the transaction was closed, petitioner remained on the winery premises for several months as caretaker and to supervise for the account of Tiara the shipment of the wine. (R. 69.) Before the sale was closed petitioner withdrew, with the consent of Tiara, 1,000 gallons of wine for his personal use. (R. 69.) He later was charged $1,000 for this wine. (R. 69-70.) He testified that this wine was not of his own production but was high-quality Italian Swiss Burgundy, the type he had sold at his retail store for $1.10-$1.20 a gallon. (R. 200, 214-215, 216, 217.)

Tiara entered the balance of the wine on its books at a cost of $77,000, and entered the winery on its books at a cost of $273,000. (R. 68.) It used these cost figures in its federal income and excess profits tax returns. (R. 68.) It did these things because the contract fixed those prices for those properties. (R. 68.)

Subsequent to the purchase by it of petitioner's winery, Tiara purchased another winery, which was larger and better equipped. (R. 602, 605.) Tiara no longer needed the Particelli winery, so decided to sell it. (R. 602, 605.) In the meantime the market broke (R. 69, 598, 603), and the winery was actually sold for $20,000 (R. 69).

Other facts are found by the Tax Court or referred to in the opinion which we consider irrelevant or do not accept as properly supported. They are discussed in the argument, infra.

Petitioner's tax returns were filed on the basis of the wine's having been sold for $77,000 and the winery for $273,000. The allocation of that sales price to the winery resulted in a capital gain of $217,634, under Internal Revenue Code Section 117(j). (R. 15.) The Commissioner reallocated the purchase price to allocate $302,500 to the wine and $47,500 to the winery. (R. 15.)[2] Deficiencies of $62,222.85 were assessed against each petitioner (R. 11, 31), which the Tax Court redetermined at the figure of $50,135.36 for each petitioner (R. 80, 81), the reduction being the result of the disposition of certain minor issues by stipulation of the parties and the reallocation of the

[2]Other adjustments were also made which were settled by stipulation of the parties in the Tax Court. They are not involved in this appeal and therefore are not further identified or discussed.

purchase price to $275,000 for the wine and $75,000 for the winery (R. 70).

SPECIFICATION OF ERRORS.

1. The Tax Court erred in admitting, over petitioner's objection, evidence tending to establish that petitioner had committed a crime, of which he had never been convicted. This evidence was not relevant to any issue in the case and was offered solely for the purpose of impeachment.

2. The Tax Court erred in holding that the Commissioner and it had authority to reallocate the prices fixed for different items of property in a written contract entered into freely by unrelated parties, neither under any compulsion to buy or sell, in the absence of evidence that the parties regarded the price allocation as a sham.

3. The Tax Court erred in failing to find that 1,000 gallons of wine which petitioner withdrew for a price of $1,000 prior to the closing of the transaction differed materially from the wine actually sold to Tiara, in that the wine withdrawn was a quality wine produced by another vintner and theretofore sold by petitioner for prices ranging from $1.10 to $1.20 a gallon, and the balance of the wine was unfinished wine produced by petitioner and theretofore sold by him for prices ranging from 32 cents to 38 cents a gallon, tax included.

4. The Tax Court erred in failing to give effect to the testimony of respondent's witness, John Dumbra, to the effect that he never was certain that he clearly understood petitioner.

5. The Tax Court erred in finding as a fact that the purchaser of the wine "considered that it was paying from $1 to $1.12 per gallon for the wine acquired from petitioner."

6. The Tax Court erred in finding that "Dumbra did not at any time agree to purchase the wine for $77,000 and the winery for $273,000."

7. The Tax Court erred in assigning a value and hence a price to the wine in excess of the OPA ceiling price.

SUMMARY OF ARGUMENT.

I. During the course of the trial respondent offered certain evidence which, by his own statement, tended to show that petitioner had made sales of wine at over-ceiling prices. He justified the offer on the ground that the evidence would impeach petitioner. Petitioner objected to the admission of the evidence on the ground that evidence of the commission of acts constituting a crime for which the party had never been convicted was improper, particularly when offered for impeachment. The Tax Court overruled the objection and admitted the evidence.

In this ruling, the Tax Court committed reversible error. The rules of evidence in the District of Columbia, which the Tax Court is required by statute to apply, do not permit the admission of evidence tending to show commission of unconvicted crimes, for purposes of impeachment. The rule is the same in civil as in criminal cases. *Chebithes v. Price* (C.A. D.C., 1930), 37 F. 2d

1008; *Campion v. Brooks Transp. Co.* (C.A. D.C., 1943), 135 F. 2d 652 (per Vinson, J.); *Sanford v. United States* (C.A. D.C., 1938), 98 F. 2d 325, 327. The rule is the same in this Court (*Dawson v. United States* (C.A. 9, 1926), 10 F. 2d 106, cert. den. 271 U.S. 687), in the United States Supreme Court (*Michelson v. United States* (1948), 335 U.S. 469), and has been specifically applied to proof of unconvicted violations of the Emergency Price Control Act (*United States v. Klass* (C.A. 3, 1947), 166 F. 2d 373).

The damaging effect of the error is evident from the fact that the Tax Court consistently discredited petitioner's testimony wherever it could possibly be deemed to be contradicted by any other evidence in the record. Moreover, the Tax Court even made a finding that petitioner had made a large sale at an over-ceiling price, a finding irrelevant for any purpose but to discredit petitioner.

II. The Commissioner and the Tax Court both lacked authority to ignore the terms of the written contract. The reliance on negotiations which were intended by the parties to be superseded by the integrated contract is contrary to established principles. The parties who made the contract were unrelated, neither was under the control of the other, and neither was under any compulsion to buy or sell. Both parties complied with the terms of the contract in their subsequent conduct. The fact that the buyer, who is not the party before the Court, entered the contract figures in its books and tax returns as reflecting the real prices it paid is final evidence that the contract prices were not sham.

The Commissioner and the Tax Court have no authority to substitute their judgment of what the prices should have been for that of the parties in these circumstances. Taxpayers have the right to conduct their own business affairs, and the tax administrator must accept them as he finds them in the absence of sham. *Twin Oaks Co. v. Commissioner* (C.A. 9, 1950), 183 F. 2d 385; *Hypotheek Land Co. v. Commissioner* (C.A. 9, 1953), 200 F. 2d 390.

III. The Tax Court made a series of findings which are unsupported by any evidence. This Court is not bound by findings of the Tax Court unless substantial evidence supports them, or unless they settle a conflict in the evidence. The Tax Court is not at liberty to reject uncontradicted evidence not improbable in character. *Grace Brothers, Inc. v. Commissioner* (C.A. 9, 1949), 173 F. 2d 170, 174.

IV. (a) The wine petitioner sold to Tiara Products Company, Inc. was no different and no more valuable than wine petitioner had sold throughout 1943 at 32-38 cents a gallon, tax included. These prices were below the lawfully established ceiling price effective in December, 1943, which was 28 cents a gallon plus taxes of 11 cents a gallon. In sales on the open market, petitioner could not have lawfully realized more than 28 cents a gallon for his wine. This price was its fair market value, which is not properly to be determined by reference to devices for circumventing the ceilings of which petitioner was ignorant.

(b) The rule is well established in condemnation cases that the United States need pay only market value for property it takes. The Supreme Court has held that goods requisitioned by the United States need be paid for by it only at the lawful ceiling prices applicable to sales in the open market, and rejected the suggestion that special means of selling for over-ceiling prices should be considered. *United States v. Commodities Trading Corp.* (1950), 339 U.S. 121. The Government, which creates these ceilings, cannot be permitted to take full advantage of them when its obligations are concerned, and then to avoid their effect where its rights are concerned.

ARGUMENT.

I. THE TAX COURT ERRED IN ADMITTING OVER OBJECTION EVIDENCE TENDING TO ESTABLISH THAT PETITIONER HAD COMMITTED A CRIME, OF WHICH HE HAD NOT BEEN CONVICTED.

During the course of the trial respondent's counsel offered evidence tending to establish that earlier in 1943 petitioner had made sales of wine at over-ceiling prices. The purpose of the proffered evidence was explained by respondent's counsel as follows (R. 523-524):

> "* * * to show that there were other sales during the year, must have been other sales during the year at higher than ceiling prices."

Petitioner's counsel at once objected to the proffered evidence on the ground that respondent was not entitled to attempt to establish that petitioner was guilty of a crime of which he had never been convicted.[3] (R. 524.) Respondent's counsel then explained that the purpose of

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[3]Selling wine at a price in excess of ceiling was a crime. Sec. 205(b), Emergency Price Control Act (50 App. U.S.C., Sec. 925(b)); *M. Kraus & Bros. v. United States*, 327 U.S. 614.

the evidence was to impeach petitioner (R. 524), and further stated that since petitioner had testified on cross-examination[4] that he had never sold at prices in excess of ceiling respondent was entitled to impeach him by contradicting that testimony. (R. 527-528.) Petitioner's counsel repeated and pressed his objection to any evidence tending to show petitioner guilty of a crime of which he had not been convicted, or even indicted or tried, since the evidence was offered only for impeachment and was not relevant to prove a necessary fact. (R. 527-528.) The Tax Court admitted the evidence over petitioner's objection and granted petitioner an exception. (R. 531-532.)

The evidence in question was testimony of a revenue agent and an accounting calculation which he testified he had prepared from the income tax returns and records of the taxpayer and from certain of the evidence in the case. After questioning the witness to be certain that the evidence did tend to establish that petitioner had sold wine at over-ceiling prices, the judge admitted the testimony and the accounting calculation as Respondent's Exhibit W. (R. 529-531.)

Exhibit W purports to establish that petitioner sold wine for an average price of 69½ cents a gallon during

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[4]Respondent's counsel was mistaken in this. On cross-examination he had asked petitioner what price he had received per gallon for certain wine sold in carload lots, and petitioner had testified that he did not remember how much he received per gallon for this wine. (R. 157, 169, 213-214.) Thus the calculation respondent persuaded the Tax Court to admit at this point was actually all that showed that price per gallon. Respondent's trial counsel must have recognized this, as appears from his argument to the Tax Court. (R. 527.)

the period when petitioner's ceiling on wine of his own manufacture was 28 cents a gallon. It is based on several hypotheses concerning the portion of his wine sales which were of sweet wine and of higher grade wine purchased from others to which this ceiling did not apply, and these hypotheses could have been established to be erroneous had the issues in the case warranted it. This demonstrates the wisdom of the rule the judge's ruling violated, which rule would have excluded evidence tending to establish guilt of a crime.

One thing respondent elaborately attempted to establish, in which attempt Exhibit W was the capstone, was that petitioner sold about 60,000 gallons of wine in carload lots to an Ohio winery, for a price of $51,800.95. The findings of the Tax Court reward these efforts with a finding to that effect, coupled with a finding that the ceiling price for the wine was about 27½ cents a gallon. (R. 61.)[5]

It is apparent, then, that respondent's counsel offered evidence tending to establish that petitioner had committed a crime, and that he defended the admissibility of the evidence against petitioner's objection on the ground that it would tend to impeach petitioner. Furthermore, the Court admitted the evidence and even made findings accepting it, thus showing the significance it had attained in the mind of the judge.

[5]Petitioner did not testify what the ceiling was on this sale, nor what he thought it was. As already noted, he testified that he did not remember the per gallon price he received for it. He also testified that this was specially prepared wine sold at carload lot prices. (R. 140-141.)

The Tax Court erred in overruling the objection. It is bound to apply, not its own rules of evidence, but those in effect in the District of Columbia. I.R.C. Sec. 1111. The general proposition, that evidence tending to establish that a witness or party has committed a crime for which he has not been convicted is inadmissible even to impeach, is followed by the courts of the District of Columbia. *Campbell v. United States* (C.A. D.C., 1949), 176 F. 2d 45; *Thomas v. United States* (C.A. D.C., 1941), 121 F. 2d 905; *Clawans v. District of Columbia* (C.A. D.C., 1932), 62 F. 2d 383. Those courts apply the rule in civil and criminal cases alike. *Hockaday v. Red Line Inc.* (C.A. D.C., 1949), 174 F. 2d 154; *Campion v. Brooks Transp. Co.* (C.A. D.C., 1943), 135 F. 2d 652; *Sanford v. United States* (C.A. D.C., 1938), 98 F. 2d 325, 327; *Chebithes v. Price* (C.A. D.C., 1930), 37 F. 2d 1008.

The rule proscribing admission of evidence of unconvicted crimes is not peculiar to the District of Columbia. This Court and other federal appellate courts enforce it. *Mitrovich v. United States* (C.A. 9, 1926), 15 F. 2d 163; *Dawson v. United States* (C.A. 9, 1926), 10 F. 2d 106, cert. den. 271 U.S. 687; *Ingram v. United States* (C.A. 9, 1939), 106 F. 2d 683; *Simon v. United States* (C.A. 4, 1941), 123 F. 2d 80, cert. den. 314 U.S. 694; *Pullman Co. v. Hall* (C.A. 4, 1932), 55 F. 2d 139. The Supreme Court also has recognized the existence of the rule. (*Michelson v. United States* (1948), 335 U.S. 469.) The leading text accepts it and regards it as firmly established. III Wigmore on Evidence (3d Ed., 1940, & Supp.), Sec. 977 et seq., Sec. 1005.

The application of the rule to unconvicted violations of the Emergency Price Control Law seems clear enough, since there is no reason why such acts should be excepted from the general rule. Thus in *United States v. Klass* (C.A. 3, 1947), 166 F. 2d 373, the rule was applied to reverse a conviction for sales in violation of established ceilings. On cross-examination, the prosecutor obtained from the defendant a denial that he had made other sales at overceiling prices. He then offered evidence to disprove the defendant's denial and thus impeach him. The admission of this evidence was held to be reversible error, since impeachment by proof of unconvicted crimes is improper. The fact the unconvicted crime was similar to the one for which the defendant was being tried did not justify departure from the established rule. Accordingly, the fact the instant case involves the government's efforts to allocate a price in excess of ceiling to a sale by petitioner does not justify attempting to impeach him by trying to prove he had made earlier sales in excess of ceiling price.

As we have pointed out above,[6] respondent's counsel believed mistakenly that on cross-examination petitioner had been asked whether he had made earlier sales in excess of ceiling, and had denied it. Had the recollection of respondent's counsel been correct, the admission of the evidence objected to would nevertheless have been erroneous, as the cited cases hold. Moreover, had respondent's counsel asked the question and received the answer he thought he had, he would have been bound

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[6]Footnote 4, supra p. 13.

by petitioner's denial. *Smith v. United States* (C.A. 9, 1926), 10 F. 2d 787, 788; *United States v. Klass* (C.A. 3, 1947), 166 F. 2d 373; *Martin v. United States* (C.A. D.C., 1942), 127 F. 2d 865, 868, 870; *Simon v. United States* (C.A. 4, 1941), 123 F. 2d 80, cert. den. 314 U.S. 694; *Howser v. Pearson* (Dist. D. C., 1951), 95 F. Supp. 936 (civil); III *Wigmore on Evidence* (3d Ed., 1940 & Supp.), Secs. 1001-1003. He could not then have disproved it.

The error in the admission and consideration of this evidence cannot be brushed aside as harmless. In the first place, as has been noted previously, the judge thought it sufficiently important to include in his findings. (R. 61.) In the second place, something impeached petitioner so completely that his testimony was consistently rejected on critical points. Thus when the court thought the testimony of John Dumbra contradicted petitioner's,[7] he accepted Dumbra's testimony even though petitioner's testimony was corroborated by his daughter (R. 240-243), and even though Dumbra himself testified that he considered petitioner's word to be reliable, on the basis of his reputation. (R. 582.) He even found that petitioner had bought back 1,000 gallons of wine of his own vintage (R. 75, 79), notwithstanding that petitioner had clearly testified that the wine he had repurchased was high quality Italian Swiss Colony wine of a type he was accustomed to sell for $1.10 a gallon and more. (R. 200, 214-215, 216-217.)

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[7]Petitioner's version of English is quite difficult to understand. (R. 60.) Dumbra admitted he had trouble with it and, while he tried to understand, he was not always certain of what petitioner was saying. (R. 579-580.) The court, however, found that Dumbra understood petitioner (R. 65), although the closest to this finding that Dumbra's testimony comes is a statement that he tried to understand petitioner. (R. 584.)

Moreover, the Tax Court failed to find that in the 275,000 gallons of wine sold in December, 1943, were 6,000 gallons of lees (sediment) which could have been expected to and did increase to 20,000 gallons by May, 1944, when the last of the wine was withdrawn. Petitioner testified to this effect and also that this lees was only worth 4 to 6 cents a gallon, having value only for brandy-making purposes. (R. 201-204, 210.) No finding was made on the value of the lees either, although petitioner's testimony on this point was also uncontradicted. The refusal to accept this testimony on a point helpful to petitioner's case[8] emphasizes the importance of the error made in the admission of the objectionable evidence.

Since the Tax Court so consistently found petitioner's testimony incredible, it is obvious that *something* impeached petitioner quite thoroughly. Nothing affirmatively suggests that it was not Exhibit W and accompanying testimony, whereas the court's finding that petitioner sold 60,000 gallons of wine in carload lots at a price in excess of ceiling affirmatively suggests this evidence successfully impeached petitioner. The finding would not have been made had it been thought irrelevant and its only conceivable relevance was to impeach, the purpose for which it was offered.

[8]Since petitioner sold 20,000 gallons of lees for 28 cents a gallon whereas he could only have obtained 4 or 6 cents a gallon by selling the lees separately, there was an advantage to him in the sale of the entire gallonage at the 28 cents ceiling which conflicts with the theory adopted by the Tax Court. Moreover, this much of the wine could not possibly have had a value of $1 a gallon, the value the Tax Court placed on it.

The decision below should therefore be reversed, because of the refusal of the Tax Court to comply with the governing rules of evidence.

II. THE WRITTEN CONTRACT WAS NOT A SHAM, AND THEREFORE THE TAX LIABILITY OF PETITIONER SHOULD BE DETERMINED ON THE BASIS OF ITS TERMS AND NOT ON THE BASIS OF PREVIOUS AND SUPERSEDED NEGOTIATIONS.

The Commissioner of Internal Revenue does not have unlimited power to substitute his conception of a proper contract for that written by the parties. The power that he has exists in him only to prevent tax avoidance. Where the parties are related or commonly controlled, the statutory terms of Section 45 provide him with limited power to ignore contracts; since petitioner was not related to the Dumbras and had no interest in their corporation, Section 45 has no application to this case.

The other areas, in which the Commissioner's power has been held to exist independently of express statutory authority, are closely related. They are the area of sham and the area of control. The former is exemplified by *Helvering v. Gregory* (C.A. 2, 1934), 69 F. 2d 809, aff'd *Gregory v. Helvering* (1935), 293 U.S. 454, and the latter by *Griffiths v. Commissioner* (1939), 308 U.S. 355, and *Commissioner v. Court Holding Co.* (1945), 324 U. S. 331. Indeed, the relationship of the two doctrines is so close that in all probability the latter one is merely a particular application of the former.

(a) The price allocation in the written contract was not a sham.

A sham contract is one which is unsupported by any conceivable facts. The contract in this case was to sell the bulk of petitioner's wine inventory for the ceiling price, and the winery for $273,000. Why should this contract be treated as a sham?

The Tax Court does not use the word "sham" in characterizing this contract. However, this language does appear (R. 77):

> "We conclude from a consideration of all the evidence here that the written contract of sale does not reflect the agreement of the parties and that the substance of the transaction between them was a sale of the wine and winery for $350,000 without any agreement on a selling price for each class of property. So concluding, it was proper for respondent to make an allocation to reflect the consideration paid for the wine and for the winery."

We take it that a "written contract of sale which does not reflect the agreement of the parties" is merely a longer and possibly more precise way of saying "sham contract."

The Tax Court therefore has held that a contract to sell wine at the ceiling price and the winery at a specified price was a sham, and that the real contract was to sell wine and winery together for an unallocated price of $350,000, thus leaving the Commissioner and the Tax Court free to fix an allocation more to their liking. We challenge the Tax Court's conclusion, and shall demonstrate that it is unsupported by either findings or evidence.

The findings and the evidence accepted by the Tax Court as credible taken together show the following facts. John Dumbra approached petitioner and offered to buy four carloads of his wine. (R. 64.) Petitioner rejected this offer because he could not make a profit on such a sale (R. 64), an answer which the Tax Court in a footnote to its opinion interpreted as meaning that petitioner "had in mind his cost of production of about 50 cents a gallon and a ceiling price of 28 cents a gallon." (R. 73.)[9] Petitioner then stated that "the only transaction he would consider would be one for the purchase of all of his wine and the winery," and next petitioner is found to have made an offer to sell wine and winery together for $350,000. (R. 64.) Dumbra did not accept this offer, and made a conditional counter-offer of $330,000, subject to the approval of his principal. (R. 64.)

Plainly, up to this point there were only preliminary negotiations by which neither party was bound, even assuming the federal rule requires that the California Statute of Frauds be ignored. Up to this point, there

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[9]This footnote, in conjunction with an express finding that "Petitioner's ceiling price for the wine was not discussed" (R. 64), demonstrates how completely petitioner's credibility was impeached by the evidence tending to establish his guilt of a crime. Petitioner testified that he assigned his low ceiling price as the reason why, if Dumbra was to get any wine, he would have to buy it all, lees and all (R. 106), and the finding just quoted rejects this testimony, notwithstanding that the quotation in the text concedes that petitioner had it in mind. He had it in mind, yet he cannot even be given credit for having been truthful when he testified that he said it! Yet John Dumbra testified that he understood petitioner to be referring to the ceiling price in their conversation about the price to which he was limited in selling his wine. (R. 581.) Thus there was no conflict in the testimony here, which makes the rejection of petitioner's testimony the more startling.

was not even an oral contract, since Dumbra's counter-offer was in law a rejection of petitioner's offer.

John Dumbra then phoned his brother, who was in New York, and obtained authorization to go up to $350,000 for wine and winery, if necessary. (R. 64-65.) John Dumbra then informed petitioner that he would pay petitioner's price (R. 65, 576), and petitioner informed Dumbra that he would meet him in San Francisco in his attorney's office to draw up the papers. (R. 576.) At that very time, petitioner informed Dumbra that the papers would fix one price for the wine and another for the winery, with the total price being $350,000 (R. 65, 577), and Dumbra expressed assent. (R. 65, 577-578.)

Up to this point there was not yet a contract. Had the parties intended their contract to be an oral one, it would have been invalid under California law because of the Statute of Frauds.[10] However, the findings of the Tax Court recognize that both petitioner and Dumbra then intended to sign a written contract which would state the binding terms (R. 65), and the testimony of both petitioner and John Dumbra make this intent entirely clear. (R. 106, 576, 577.) Pursuant to their intention, the two men met the next day in San Francisco in the office of petitioner's accountant, Mr. George E.

[10]Civil Code Sec. 1624 declares "invalid" an oral contract to sell real property, and Sec. 1624a declares "unenforceable" an oral contract to sell personal property of a value in excess of $500, until there is part performance. There was no part performance until a later day when a $5,000 deposit was paid, but on that same later day the written contract was signed.

Oefinger, C.P.A. (R. 65.)[11] There the accountant advised petitioner that the ceiling price on his wine was 28 cents a gallon and that he would be subject to penalties if he sold it for more than that price. (R. 65, 264-265.) 275,000 gallons of wine at 28 cents a gallon is $77,000 (R. 267), the price allocated to the wine in the written contract the parties signed later the same day. (R. 65-66.)

After the accountant had calculated the ceiling price of the wine, petitioner called an attorney by the name of Fred Foster and asked him to prepare the written agreement. The accountant so testified (R. 269), and the testimony of Mr. Foster confirms it. (R. 398.) Mr. Foster prepared the agreement in accordance with instructions given to him by petitioner in the presence of John Dumbra. (R. 398-399.)[12] This agreement (Exh. A-1, R. 45-46; R. 66) was signed that same day "by Particelli as Seller and John Dumbra as Buyer." (Stip., par. 1, R. 44.) The written agreement quite clearly states that the price the purchaser is paying for the wine is $77,000 and that for the winery is $273,000. The Tax Court made no effort to place a different construction on the instrument.[13]

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[11]As noted heretofore in the text, Dumbra testified that the arrangement was to meet in the office of petitioner's attorney (R. 576), whereas petitioner testified that it was in the office of his accountant that they were to meet so that the accountant could calculate the ceiling price. (R. 106.) The Tax Court found the meeting occurred in the accountant's office (R. 65), presumably because the accountant and the attorney both so testified. (R. 263, 398.)

[12]Mr. Foster testified that he had earlier advised petitioner that he thought this sale would be subject to the same price ceiling as an ordinary sale of wine. (R. 397.)

[13]In view of the stipulated facts summarized above, the following sentence in the opinion of the Tax Court is clearly error (R. 65): "Dumbra did not at any time agree to purchase the wine for $77,000

It was clearly the intention of the parties to integrate their agreement into the written contract. If the circumstances recited above could leave any doubt of this, John Dumbra's testimony on another point would remove it. He testified that the oral understanding he and petitioner had reached was dependent on verification of the gallonage in the tanks, which verification was made by checking certain reports immediately prior to his signing the written agreement of sale. (R. 585.) He was asked (R. 587):

> "If it was, as you put it, too far away from the gallonage that Mr. Particelli had represented to you, would you have signed this agreement?"

To which he answered (R. 588):

> "No."

Thus we have here the familiar situation of an integrated contract. The Restatement (Restatement of the Law of Contracts, Vol. 1, Sec. 242, Comment) states the rule as follows:

> "Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express."

In some respects the Restatement has gone farther than some courts in permitting the use of parol evidence to interpret integrated contracts, since Section 242 allows

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and the winery for $273,000." This finding is not only contrary to the stipulated facts but is belied by the following finding of the Tax Court (R. 65-66): "Thereafter, on the same day, petitioner and Dumbra, acting for Tiara, executed an agreement reading in part as follows: (then follows the text of the agreement)." This error is specified above as Specification of Error No. 6.

parol evidence to *establish* an ambiguity, as well as to *explain* one. However, the rule quoted above, which clearly prohibits the use of previous negotiations to *alter* an integrated contract, finds no dissent in American law of contracts.

The United States Supreme Court had occasion to fix the federal rule on this point in a series of early procurement cases arising in the Court of Claims. The words of the Court in *Brawley v. United States* (1877), 96 U.S. 168, 173-174, state the law quite clearly and succinctly:

> "The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

To the same effect are *Parish v. United States* (1869), 8 Wall. (75 U.S.) 489, and *Clark v. United States* (1868), 131 U.S. lxxxv, App., 19 L. Ed. 915. To the same effect in private diversity of citizenship cases are *The Union Mutual Life Ins. Co. v. Mowry* (1878), 96 U.S. 544, and *Wadsworth v. Warren* (1871), 12 Wall. (79 U.S.) 307. More recent federal usage is consistent with and accepts the *Brawley* statement, supra, as is evident from *United States v. Bethlehem Steel Co.* (1907), 205 U.S. 105, 117;

Sarnia Steamship, Ltd. v. Continental Grain Co. (1941, C.A. 7), 125 F. 2d 362, 364; *M. W. Kellogg Co. v. Standard Steel Fabricating Co.* (1951, C.A. 10), 189 F. 2d 629, 630-631.

It is therefore evident that, as the *Brawley* case held, even where the interests of the United States are involved, a written contract supersedes the negotiations and where its terms are clear cannot be overridden or contradicted by them. The Restatement rule of integrated contracts, quoted above, is thus applicable here. The written contract, being perfectly clear, should control, and the preliminary negotiations, even if inconsistent with it,[14] cannot be substituted for the written contract.

The conduct of the parties after the signature of the contract establishes (1) their mutually consistent understanding of its terms and (2) their understanding that they were bound by its terms. It seems clear beyond dispute that the parties' conduct subsequent to the contract would be inconsistent with its terms if it were a sham.

The most revealing conduct was that of the purchaser, Tiara Products Co., for whom John Dumbra was acting. Its conduct was consistent with the terms of the written contract and can be explained only on the ground that Tiara considered that it was bound by the allocation of purchase price in the contract. About two weeks after

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[14]We do not concede that they are, since they contemplated the summation of a written contract in which there would be an allocation of purchase price between wine and winery. Dumbra was indifferent to the allocation but he testified that he was agreeable to it. (R. 577.)

the signature of the contract, Tiara sent its escrow instructions to the Bank of Sonoma County, the escrow agent. There were two instructions. One of these (Stip. par. 2, Exh. B-2; R. 44, 46-47; R. 67) instructed the Bank to pay $77,000 to petitioner on receipt from him of a bill of sale to the wine. (Exh. B-2, R. 46-47). A separate letter instructed the Bank to pay $268,000 to petitioner on the receipt from him and recordation of a bill of sale and grant deed to the winery, and the equipment in it. (Stip. Exh. D-4, R. 48-50.)[15] These two instructions were not mutually conditioned, so that the Bank would have had to pay petitioner $268,000 on recordation of the deed to the winery, even though the bill of sale to the wine was not tendered.

If the buyer had intended the contract to be a single sale for a lump sum of $350,000, any documents which the buyer had under its sole control would suggest that intent. The separate escrow instructions, exposing the buyer to the possibility of having paid $273,000 ($268,000 plus the $5,000 deposit) for the winery and equipment, without getting the wine, show quite clearly that the buyer did not consider the written contract and the price allocations in it to be shams.

It is pertinent in considering the significance of the buyer's escrow instructions to bear in mind that they were signed for the buyer by its attorney, A. M. Mull, Jr.[16] (R. 47, 48; R. 290, 298.) He testified that he under-

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[15]Exhibit D-4 replaced an earlier escrow instruction, Exh. C-3. (R. 47-48; Stip. par. 3, R. 44.)

[16]Mr. Mull is the same A. M. Mull, Jr. who was president of the State Bar of California in 1950. (R. 290.)

stood these escrow instructions to be consistent with his instructions from his client. (R. 298.) The only possible conclusion to be drawn from this evidence is that the buyer knew what it was doing and deliberately, not inadvertently, gave these escrow instructions which, as noted, cannot possibly be reconciled with the view that the buyer thought the written agreement was a sham.

The next evidence of the buyer's real intention is in the way the transaction was recorded on the buyer's records and in its income tax returns.[17] The parties to this case stipulated (R. 57) and the Tax Court found (R. 68) that the buyer entered the wine on its books "at a cost price of $77,000," and also used this figure as the cost of the wine in its 1943 and 1944 federal income and excess profits tax returns. Tax returns, it will be noted, are signed under the penalties of perjury.

[17]The Tax Court waved aside this evidence as insignificant, citing *Doyle v. Mitchell Bros. Co.* (1918), 247 U.S. 179. This reference indicates how completely the Tax Court missed the point. In that case a corporation revalued its timber lands on December 31, 1908, and "the good faith and accuracy of this valuation (were) not in question, but the figures representing it never were entered in the corporate books" (247 U.S. at 181). After deciding the corporation was entitled to use the 1908 value in its tax returns, the Court said (247 U.S. at 187) that the failure to enter the value in the books was not controlling, "Such books are no more than evidential, being neither indispensable nor conclusive." If the corporation had entered in its books a figure inconsistent with that for which it contended, that "evidential" fact would have weighed heavily against it. The "evidential" fact here—and we do not contend it is more than "evidential"—is that the buyer had to make some entries in its books, it did so, and the entries accept the contract figures. These entries were made after the contract was fully executed, at a time when the buyer was entirely free to record its own concept of the transaction. The fact the recorded concept is consistent with petitioner's is thus a fact of great weight.

I.R.C. Sec. 3809(c). Moreover, the winery was entered on the buyer's books at a cost price of $273,000, and that figure was also used as its cost in the buyer's federal tax returns. (R. 57, 68.) The buyer used these figures because they were set forth in the written contract of sale. (R. 58, 68, 612-613, 613.) Victor Dumbra, the buyer's president, testified that the $77,000 wine cost was not a fictitious figure but was the real cost of the wine to the buyer. (R. 622.)

This evidence clearly shows that the buyer thought the allocation in the written contract of sale was real and binding on it. It recognized the real price of the wine as being $77,000. Its actions not only fail to establish a sham contract, but affirmatively establish that so far as the buyer was concerned the allocation in the written contract was not a sham.

Petitioner's conduct subsequent to the signature of the written contract also is consistent with the allocation in it. His escrow instructions were likewise contained in two letters (Stip. par. 4, Exhs. E-5 and F-6, R. 44, 50-51), and like Tiara's instructions his were not mutually conditioned. The Bank was instructed to deliver the bill of sale for the wine to Tiara on payment to the Bank of $77,000, and nothing was said about withholding the wine until the $268,000 to be paid for the winery was also received.

If, as the Tax Court held, the parties really intended a purchase and sale of the winery for $75,000 and of the wine for $275,000, both parties were strangely trustful in their escrow instructions. Perhaps petitioner's trustfulness could be explained away on grounds of self-interest, if he was actually carrying out a grand deception, but Tiara's trustfulness cannot be so explained. It had nothing to gain by taking any chances. Its action can be explained only on the ground that it thought the prices in the written contract were binding.

The Tax Court gave no effect to the foregoing evidence but instead placed weight on facts found by it, to the effect that the revenue stamps placed on the deed were based on a valuation of $100,000, and the petitioner withdrew 1,000 gallons of wine and received a credit of $1,000. (R. 75-76; 67; 75.)

The Tax Court's finding about the revenue stamps is not objected to, but the inference it drew therefrom is indefensible. Section 3482, I.R.C. imposes a tax of 55 cents per $500 on sales of "lands * * * or other realty." It does not apply to sales of winery equipment that has not become affixed to the realty. Included in the winery which was sold for $273,000 was, as the buyer's escrow instructions state (Exh. D-4, R. 49), "all of the equipment and the personal property now contained therein, other than the stock of wine." This equipment included supplies, three wine pumps, two hydraulic presses and other production equipment (Exh. G-7, R. 52), plus redwood fermentation vats and redwood and oak storage barrels. (R. 509-510.) Government witness John Dumbra testified that this equipment and cooperage were all in sound shape (R. 575-576), and government witness Gomberg testified that in 1943 all such items were in short supply. (R. 496-497.) The storage barrels were particularly valuable to the buyer, as a place to store the wine it was buying. The Tax Court thus overlooked the fact that a substantial portion of the winery property which was sold for $273,000 was not subject to the stamp tax, and accordingly erred in believing that the fact that only $100,000 of value was stamp tax paid was an indication that the parties believed the winery was only worth $100,000.

The Tax Court also erred in attaching significance to the fact that petitioner withdrew 1,000 gallons of wine at $1 a gallon.[18] This was not young, unfinished wine of his own manufacture, such as nearly all the wine sold was, but was Italian Swiss Colony Burgundy, of the sort petitioner customarily had sold for prices ranging from $1.10 to $1.20 a gallon.

Government's Exhibit L states the background of this matter, and the relevant passage from the exhibit is quoted at page 133 of the printed record. It is as follows:

> "You will recall that 1,000 gallons were withdrawn by Mr. Particelli prior to the closing of the deal and that the whole deal amounted to 274,000 gallons, with an adjustment to be made by Particelli in connection with the 1,000 gallons."[19]

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[18]This point is Specification of Error No. 3, above.

[19]Petitioner's testimony was (R. 132):

"* * * I reserved the right to take some wine when I sold the winery and wine to Mr. Dumbra. * * * I still have a few barrels.

Q. How much wine was that?

A. Around 1,000 gallons."

Prior to the sale, petitioner not only operated a winery but a small retail store at which he sold wine, and this store and attached bottling plant (R. 60, 157, 165) were not sold to Tiara. (Exh. A-1, R. 46; R. 204.) From this store he had sold several grades of wine, most of which, prior to the sale to Tiara, was wine purchased by him from other producers. (R. 61, 190-192, 194-197.) The best grade of this was wine purchased from Italian Swiss Colony, and of that petitioner retailed the dry wine at prices ranging from $1.10 a gallon (R. 194-195) to $1.20 a gallon. (R. 201.) Petitioner testified that the 1,000 gallons he withdrew was all high-grade wine of this sort, and he specifically identified it as Burgundy (R. 200) from Italian Swiss Colony such as he had in the past sold for $1.10 and $1.20 a gallon. (R. 214-215, 216, 217.) In fact, he testified that at the time of the hearing he still had one or two 50-gallon barrels of it in his basement. (R. 217; cf. R. 132.)

The Tax Court either overlooked or ignored this testimony and found that the 1,000 gallons withdrawn was wine of petitioner's own vintage on which the ceiling was 28 cents a gallon. The Tax Court erred in doing so. This testimony was certainly not inherently improbable; it was adhered to and even elaborated on cross-examination, and it was uncontradicated. It could not properly be rejected. *Grace Brothers, Inc. v. Commissioner* (C.A. 9, 1949), 173 F. 2d 170 at 174.

Perhaps the Tax Court was confused. Petitioner's testimony indicates that until the trial of this case he had never realized that he was charged $1 a gallon for this wine which he withdrew. At R. 132 he testified that he bought it back for 28 cents a gallon, and at R. 134-135 he stated that if he was charged $1 a gallon for it then someone, either he or Mr. Mull, made a mistake. This testimony was referred to by the Tax Court, which concluded "our opinion is that the parties agreed that the credit was a fair estimation of the amount paid by Tiara for the wine." (R. 75.) Even if the Tax Court's quoted opinion were correct, it would be irrelevant since the wine withdrawn was not like the other 274,000 gallons but was high-grade Italian Swiss Colony Burgundy which petitioner had been selling for $1.10-$1.20 a gallon.[20]

Accordingly, there was no evidence *of any kind* tending to show that the written contract was a sham. The parties did not ignore its terms or act as if they were not bound by its terms. On the contrary, all the evidence is that the parties considered the prices set forth in the written contract controlling.

(b) The buyer's motives were not communicated to petitioner and could not bind him.

Considerable emphasis was placed by the Tax Court on evidence relating to Tiara's motives for purchasing the wine and winery on petitioner's terms, including its finding that Tiara did not want the winery but purchased it only to get the wines in it. (R. 65.) We submit that, since these motives were not shown to have been com-

[20]Prior to this sale to Tiara, petitioner had sold wine of his own vintage for 32-38 cents a gallon (R. 61, 98-99), which is equal to 21-27 cents a gallon in bulk before the alcohol taxes totalling 11 cents a gallon (R. 61) were paid. The bulk ceiling price of 28 cents a gallon was before tax. (R. 266.)

municated to petitioner, they do not have the slightest tendency to control petitioner's tax liability.

In this connection, it is notable that the Tax Court did not think it necessary to determine *petitioner's* motive. The Tax Court said (R. 76-77):

> "We need not determine petitioner's motive for having the written contract of sale specify a separate sales price for each class of property. The terms of the agreement in that regard were a matter of indifference to Tiara."

Yet the Tax Court in the preceding paragraph (R. 76) found light in Tiara's motives, and even gave weight to the fact that "Victor Dumbra testified that when considering the purchase from petitioner he made a mental calculation of the transaction and concluded that the winery might be worth $50,000 or $60,000."

We admit that the taxpayer's motives can be examined to ascertain if the transaction was entered into by him in good faith. *United States v. Cumberland Pub. Service Co.* (1950), 338 U.S. 451, 455. The motives of the other party to a contract, however, where not communicated to the taxpayer, can have no bearing on the *taxpayer's* purpose and good faith.

The evidence of Tiara's motive is almost entirely in the testimony of Victor Dumbra. Victor Dumbra did not meet petitioner or participate in the negotiations with him. He remained in New York while his brother John negotiated with petitioner in California, and before John accepted petitioner's terms he telephoned Victor for approval. (R. 574-575, 576, 592-593.) Victor's testimony about his mental calculations and his reason for authorizing John to enter into the contract is irrelevant to petitioner's good faith, and falls far short of impeaching Tiara's good faith in entering into the written contract.

It must be recalled that in 1943 the wine business was a Wonderland which Alice probably would have recognized. The manner in which the price ceilings operated is described in detail in the testimony of the witness Gomberg. (R. 417, et seq.) In summary, it shows that OPA imposed no ceiling on grapes but placed ceilings on wine. There was a flat 28-cent ceiling on bulk red wine except for sellers who had made sales in bulk or bottles at prices above that figure prior to a basic date in 1942. Petitioner's ceiling on wine of his own vintage, as noted, was 28 cents a gallon plus tax, but Tiara had a bulk ceiling of \$1.10 to \$1.25 a gallon on red wine and about \$2.00 a gallon net to it on bottled red wine. (R. 599-600, 620.) Since wine was in such demand that standards of quality were greatly relaxed, petitioner's wine had a much lower value to him than it had to Tiara.

It was in this context that Victor testified that he figured Tiara could afford to pay \$1.00 to \$1.10 a gallon for petitioner's wine. (R. 601.)[21] He also testified categorically that the price Tiara actually paid for the wine was that price stated in the contract (R. 610-611, 612, 613, 622) and that the \$1.00 figure was only the value of the wine to Tiara, not to all others. (R. 613.) The obvious implication is that he had a sufficient cushion

[21]This discussion also relates to Specification of Error No. 5, above.

between the 28-cent contract price and the higher value of the wine to Tiara so that he need not concern himself with whether he made a bad bargain for the winery. This patently does not mean that any contracted prices were fictitious, and he specifically denied that they were fictitious. (R. 622.) Since he was the Commissioner's witness, the Commissioner is bound by his testimony—that which harms the Commissioner's case as much as that which helps it.

Accordingly, Tiara's motives are not entitled to consideration because they were not communicated to petitioner, and even if considered they fail to have the effect the Tax Court gave them.

(c) Neither the Commissioner nor the Tax Court has authority to rewrite the contract, since it was not a sham.

The Tax Court cited four cases,[22] three of which were its own decisions, as authority for its conclusion that the Commissioner has power to rewrite the contract. We fail to grasp the import of the last two on this case, but the point for which the first two are cited is quite revealing. The first of them is a non-tax case between private litigants, in which parol evidence was held admissible to show that a contract was without consideration, notwithstanding the recital of consideration in it. In the opinion, at the page cited in the footnote, the Court of Appeals said:

> "* * * the recitals of a written instrument as to the consideration received are not conclusive, and

[22] *Deutcher et al. v. Marlboro Shirt Co., Inc.* (1936, C.A. 4), 81 F. 2d 139, 142; *Haverty Realty & Inv. Co.,* 3 T.C. 161; *Nathan Blum,* 5 T.C. 702; *C. D. Johnson Lumber Corp.,* 12 T.C. 348.

> it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was."

Cases cited by the Court of Appeals for this proposition include *Cabrera et al. v. American Colonial Bank* (1909), 214 U.S. 224, and *Hitz v. National Metropolitan Bank* (1884), 111 U.S. 722. These two cases permit a party to a written contract to introduce parol evidence to show that the real consideration differed from that recited in the contract.

In the first of its own decisions cited in the opinion herein,[23] the Tax Court held that parol evidence was properly received by it because (1) the parol evidence rule has no application to third parties, which the Commissioner was, and because (2) parol evidence is always admissible, here quoting the sentence from the *Marlboro Shirt* case which we have set out above, to inquire into the validity of the consideration for a contract.

The Tax Court in the case at bar has evidently not distinguished between the admissibility of parol evidence and its effect. We never challenged the admissibility of parol evidence, even below, but we have never admitted that the evidence produced tended to override the consideration fixed by the parties in their contract.

The distinction the Tax Court seems not to have appreciated is clearly made in the Restatement of the Law of Contracts. Section 238(b) states that parol evidence is admissible even in the case of an integrated contract,

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[23]*Haverty Realty & Inv. Co.,* 3 T.C. 161, 167.

such as we have here, to show "illegality, fraud, duress, mistake or insufficiency of consideration." The Restatement accepts the basic proposition that a contract is not enforceable unless supported by consideration (Sec. 19(c)) and then provides (Sec. 81):

> "Except as this rule is qualified by Sections 76, 78-80,[24] gain or advantage to the promisor or loss or disadvantage to the promisee, or the relative values of a promise and the consideration for it, do not affect the sufficiency of consideration."

The illustrations given state even more clearly than the principal statement that what is meant is that the victim of a bad bargain cannot plead insufficiency of consideration.

The findings clearly establish that as events turned out Tiara made a bad bargain in the price it paid for the winery. But Tiara could not have avoided the terms of the contract for that reason. Neither could it have voided the sale because, as events turned out, Tiara did not make such a good bargain as it thought for the wine.[25]

It follows, therefore, that the authorities discussed do not, contrary to the apparent view of the Tax Court, authorize either it or the Commissioner to rewrite a contract which the parties could not have avoided.

The Tax Court also cited *Commissioner v. Court Holding Co.* (1945), 324 U.S. 331, and *U.S. v. Cumberland*

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[24]These exceptions are not in point. Most of them deal with promises as consideration.

[25]Tiara bought the wine in the belief it was not bound by petitioner's 28-cent ceiling. To its sorrow, it found that it was, in respect of about half of the wine involved. (R. 69, 617-618.)

Service Co. (1950), 338 U.S. 451, for the Commissioner's and its authority to rewrite the contract. (R. 71.) We submit that they confer no such authority.

In the first place, we dispute the validity of the Tax Court's apparent view (R. 71) that the only difference between the two cited cases is in the ultimate fact found by the trial court. The Supreme Court did not mean that in that area of law the trial courts are free to decide like cases differently. *St. Louis Union Tr. Co. v. Finnegan* (C.A. 8, 1952), 197 F. 2d 565, 568. See *Twin Oaks Co. v. Commissioner* (1950, C.A. 9), 183 F. 2d 385, where this Court reversed the Tax Court in a related field, and *Goold v. Commissioner* (1950, C.A. 9), 182 F. 2d 573, where it reversed the Tax Court on the question of intent. An even more recent expression of this Court's views of its power of review of the Tax Court is in *Hatch's Estate v. Commissioner* (1952, C.A. 9), 198 F. 2d 26, where this Court reversed the Tax Court for its failure to follow the plain terms of a written contract.

There are vital factual differences between the *Court Holding* and *Cumberland* cases. In *Court Holding,* a corporation had orally committed itself to sell its property on certain terms, and then arranged the written contract to have its shareholders make the sale. Whereas in *Cumberland,* the parties who negotiated the sale were found to have conducted the negotiations at all stages for themselves as shareholders, not for the corporation. This finding is the one the Supreme Court meant to refer to as distinguishing the two cases, not the ultimate finding of liability.

In the second place, if petitioner had controlled Tiara or the Dumbras, the cited cases would be closely in point. The right to scrutinize closely transactions whereby shareholders cause their corporation to act has been long recognized, because one controls the other. It does not follow that a sale between unrelated parties, not subject to common control, where both are free to refuse to contract, is subject to similar skeptical review.

In the third place, the *Cumberland* case is controlling here, in favor of petitioner. In *Cumberland,* there was no arm's length bargaining between the contracting parties on the subject of whether the sale was to be by the corporation or its shareholders. The shareholders laid down the condition that the sale would be made by them, and the buyer, not being interested in who made the sale so long as someone did, acquiesced in the shareholders' terms. This circumstance was not enough to permit the Commissioner to disregard what the parties actually contracted in the *Cumberland* case, so it was error for the Tax Court to hold that the fact that Tiara did not care whether petitioner sold wine for the ceiling price justified the Commissioner in disregarding a contract in which the parties said they bought and sold wine for that figure.

The quotations from the Supreme Court opinion in the *Cumberland* case which appear in the Tax Court's opinion below (R. 71-72) merely mean that the "motives, intent, and conduct" can be looked to to determine if the papers are a sham. If they are not sham, the Commissioner is bound by what the parties have created.

Since this is true where the circumstances are entirely within the control of the tax-paying interests, as in the *Cumberland* case and the *Twin Oaks* decision of this Court (183 F. 2d 385), it is *a fortiori* true here.

Since the conduct of the parties, and particularly significantly that of the buyer, does not show they considered the price allocation to be a sham, Commissioner and Tax Court are bound by its terms.

Interestingly enough, there are other recent cases in which the Tax Court has shown that it understands that the law is as we outline it. In *Wood Process Co.,* 2 T.C. 810, and *McCulley Ashlock,* 18 T.C. 405, it held that the tax effect of a contract depends on its terms, not on the circumstances motivating its execution. And in *Estate of Jacob Resler,* 17 T.C. 1085, acq. 1952-1 C.B. 3, the circumstances were essentially analogous to those herein, but the Tax Court held the final result was controlling, not the negotiations leading up to it.

We are at a loss to explain the aberration here. This is not a tax avoidance case. The evidence previously discussed clearly shows that petitioner acted on advice that the sale must be at ceiling price and insisted that the ceiling price be allocated to the wine in order to comply with regulations of the OPA as he understood them. The Tax Court did not make a finding as to petitioner's motive (R. 76-77); it pointed out that regardless of what advice the evidence shows that petitioner received, there was no ceiling applicable to this sale. It then observed (R. 77): "Had the respondent accepted petitioner's representation of sale, the result would have been a saving of tax to petitioner."

Perhaps the Tax Court meant, in the passages just referred to, to imply that it thought petitioner was motivated by tax avoidance motives. If its decision is meant to be distinguished from its other decisions referred to by the supposed presence here of such a motive, the decision is wrong. *U. S. v. Cumberland Public Service Co.* (1950), 338 U.S. 451 at 455, specifically states that the presence of tax avoidance motives will not alone support a tax assessment. In *Twin Oaks Co. v. Commissioner* (C.A. 9, 1950), 183 F. 2d 385, and *Hypotheek Land Co. v. Commissioner* (C.A. 9, 1953), 200 F. 2d 390, this Court quite recently has reversed the Tax Court for overlooking the fact that it cannot impose a tax merely because the taxpayer may have arranged his business affairs as he did in order to avoid the tax.[26]

III. THE TAX COURT MADE FINDINGS WHICH ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THIS COURT IS NOT BOUND BY THEM.

Specifications of Error numbers 3, 4, 5, and 6 challenge certain specific findings of the Tax Court. Each of them has been discussed above. No. 3 is discussed at pp. 31-33, No. 4 at p. 17, No. 5 at pp. 35-36, and No. 6 at pp. 23-24. To repeat the discussions would unduly lengthen this brief so we shall not do so.

The power of the Court to consider these specific objections as well as those more general objections argued

[26]And cf. *Goold v. Commissioner* (1950, C.A. 9), 182 F. 2d 573, where this Court rejected the Tax Court's finding respecting intent and itself found that there was no motive to escape taxes. It also held such motive, if present, was irrelevant. 182 F. 2d at 575.

in the preceding division of this brief is sustained by *Grace Bros., Inc. v. Commissioner* (C.A. 9, 1950), 173 F. 2d 170, where the Court thoroughly discusses its power of review of Tax Court findings.[27] We have not challenged here the findings in which the Tax Court settled a conflict in the evidence, nor in which it drew an inference which the evidence could be interpreted to permit.

Specification No. 3 is based on the Tax Court's ignoring clear, uncontradicted testimony by petitioner which is not improbable in character. Nos. 4 and 5 are based on the Tax Court's apparent failure to read the portion of the testimony of witnesses whom the Tax Court credited in which their testimony is squarely contrary to the findings supposed to be based on it. Error No. 6 is so apparent that we are inclined to believe it found its way into the formal findings by mistake. Each challenged finding is insupportable and is not binding on this Court.

IV. THE FAIR MARKET VALUE OF THE WINE COULD NOT EXCEED ITS CEILING PRICE, AND IT WAS ERROR FOR THE TAX COURT TO ASSIGN A HIGHER SELLING PRICE TO IT.

(a) The Tax Court has found that in the months immediately prior to December, 1943, petitioner sold wine of the same type and quality as that involved in

[27]Cases reversing the Tax Court in cognate fields are *Goold v. Commissioner* (1950, C.A. 9), 182 F. 2d 573; *Twin Oaks Co. v. Commissioner* (1950, C.A. 9), 183 F. 2d 385; *Hatch's Estate v. Commissioner* (1952, C.A. 9), 198 F. 2d 26; *Hypotheek Land Co. v. Commissioner* (1953, C.A. 9), 200 F. 2d 390, and *Benton v. Commissioner* (1952, C.A. 5), 197 F. 2d 745. In the latter case, the Tax Court was reversed for departing from the terms of a written contract in favor of its own ideas of what the contract should have been.

the Tiara sale, and he sold it at prices ranging between 32 and 38 cents a gallon, depending on volume. This price included the 11 cents of state and federal wine taxes, so the net prices to him were 21-27 cents a gallon. (R. 61.) At this time his ceiling before taxes was 27½ cents a gallon. (R. 61.) Yet the Tax Court has also found that this same sort of wine had a market value of $1.00 a gallon when it was sold to Tiara in December, 1943. (R. 79.) We believe that we can demonstrate that this latter finding is clearly erroneous, thus constituting error which this Court can correct (*Grace Bros., Inc. v. Commissioner* (1949, C.A. 9), 173 F. 2d 170, 173).

In addition to the evidence and findings about prices petitioner had received in earlier sales of wine of his own production, the record contains similar evidence from government witness Mondavi. His winery (Charles Krug) produced quality wines and also the so-called competitive or lower grade wines. (R. 333-335.) It produced a quality Zinfandel, aged four years or more before being marketed, which it sold for $6.00 a case of 2.4 gallons, net to the winery. (R. 334.) This is a price, net to the winery, of $2.50 a gallon. Petitioner's vintage which sold for 21-27 cents a gallon net to him, and which was sold to Tiara, was also Zinfandel, but it was neither aged nor finished. (R. 615.) Mondavi's winery likewise sold a wine comparable to that of petitioner, except that it was finished (R. 335-336), and prior to October, 1943 that wine was sold by Mondavi's winery for 35 cents a gallon. (R. 337.)

In October, 1943, Mondavi began selling his competitive wine by what he called the "contract bottling arrangement." (R. 336, 337.) As described by the Tax Court, this method "consisted of shipping the wine to a bottler to be bottled for the account of the winery, and then selling the bottled wine to the bottler." (R. 63.) In Mondavi's own words (R. 317), this method was used to "circumvent" the ceilings applicable to bulk sales. Mondavi testified that by resort to this circumvention, a vintner could obtain 75 cents to $1.00 a gallon for competitive grade wine, and therefore he valued such wine at 75 cents to $1.00 a gallon. (R. 315-317.) Government witness Gomberg testified to a value of $1.00 a gallon for such wine (R. 458), and he too placed his opinion squarely on prices obtained by this method, which he called the franchise bottling method. (R. 460.)[28]

Fair market value cannot be based on sales under conditions not representive of normal market conditions. Prices produced by pronounced speculative pressures are not evidence of fair market value. (*Tex-Penn Oil Co. v. Commissioner* (C.A. 3, 1936), 83 F. 2d 518, aff'd 300 U.S. 481; *Strong v. Rogers* (C.A. 3, 1934), 72 F. 2d 455, cert. den. 293 U.S. 621.) Sales must be on a normal and open market to establish a fair market value (*Wood v. U.S.* (Ct. Cl., 1939), 29 F. Supp. 853; *Hazeltine Corp. v. Commissioner* (C.A. 3, 1939), 89 F. 2d 513), and legally en-

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[28]His testimony was (R. 460-461):

"Q. What is your opinion based upon, your opinion wine was worth a dollar a gallon in 1943?

* * * * * * *

A. I would say primarily upon franchise bottling.

Q. Is it based upon the bulk sale of the wine and winery at all?

* * * * * * *

A. No, it is based upon the amount of money that the winery could get for the wine in the form of bottled goods."

forceable restrictions operate as a ceiling to value for tax purposes (*Helvering v. Salvage,* (1936) 297 U.S. 106, 109). Sales based on a device for circumventing the price ceilings cannot establish an open and free market, at least unless the device is generally known and open to all to use.

The evidence here is quite clear that this device was not generally known in December, 1943. Although Mondavi testified he began using it in October, 1943, he also testified that it was not until early 1944 that his firm received a ruling from OPA that it would not object to the use of this method. (R. 349.) Thus it was not until after the transaction herein involved was concluded that Mondavi knew whether or not his firm would be subjected to penalties for selling under the contract bottling method at prices above the bulk ceiling price. Plainly, we submit, Mondavi's testimony fails to establish that when this sale was made the contract bottling method had created an open market for wine at overceiling prices.

The government witness Gomberg, who also based his opinion upon sales made in this manner, testified that while he knew of an oral ruling made by someone in OPA in late 1943 approving contract bottling (R. 495), he did not know of any written ruling to that effect. (R. 496.) Since oral rulings by government officials have no binding effect, no careful seller would have regarded Mr. Gomberg's information as establishing an open and free market for wine at prices above the bulk ceiling. Mr. Gomberg, who was affiliated with the Wine Institute, did not inform petitioner of this oral ruling; in fact, he did not recall ever having met or talked to petitioner, although he thought possibly he had done so in 1941 or 1942. (R. 488.) There was no information about the contract bottling method in the Wine Institute bulletins to the wine industry until late 1944 or early 1945. (R. 452-453.)

Accordingly, Gomberg's testimony, like that of Mondavi, shows there was not, in December, 1943, such general knowledge and confidence in the safety of the contract bottling method as to establish an open and free market for wine at prices above the bulk ceilings.

If petitioner had known of the contract bottling circumvention, perhaps the foregoing discussion would have less point. There is not, however, any evidence that either he or Dumbra knew of it. There is the evidence that petitioner did not. Both petitioner's lawyer and his accountant testified that they advised him he must sell his wine at the ordinary bulk ceiling.

Furthermore, the fundamental premise of the Tax Court decision is that Tiara bought the winery because it was the only way petitioner could be paid a price he would accept.[29] The Tax Court also has found, based on Dumbra's testimony, that petitioner told Dumbra he wanted to get out of the business and *that* was why he would only sell winery and wine together (R. 64, 73), and has treated that statement which it finds petitioner did make in 1943, as

[29]In three different places the Tax Court finds or states that Tiara bought the winery only because it had to to get the wine. (R. 65, 68, 76.)

being only a guise,[30] designed to obscure the fact that petitioner wanted to sell the winery because in no other way could he obtain a price for the wine which he was willing to accept.

This premise and theory are at odds with any inference that either petitioner or Dumbra knew of the contract bottling method. If Dumbra knew of it, and did not want the winery, it represented a much better way of getting the wine. Had he known of it, can it be supposed he would have failed to inform petitioner of it? Clearly not. Had petitioner known of it, can it be supposed he would have sold the winery? Clearly not, unless petitioner really wanted to get out of the business.

If petitioner had sold under the contract bottling method, he could have received 75 cents or more per gallon of wine, on Mondavi's testimony, which would have been a profit of 25 cents or more a gallon over his cost. Moreover, as an added inducement, he would still have kept his winery to make more wine to sell at a profit under the contract bottling method next year. His sale of the winery, if he knew of the contract bottling method, was against his own best interests. The only possible inference is that neither petitioner nor Dumbra knew of that method.

Since petitioner and Dumbra were not aware of the contract bottling method, they cannot properly be held to have contracted on the basis of a market value based entirely on it. The Tax Court erred in finding a value for the wine on such a basis, and unless the wine had such a value peti-

[30] And this notwithstanding the fact that petitioner never re-entered the wine business.

tioner cannot be treated as having sold it for $1.00 a gallon.

(b) We do not accept the view that the Government can have one rule for determining its liabilities and one more favorable to it for determining its rights. The Tax Court had no difficulty rationalizing that double standard, but since its jurisdiction causes it to concern itself only with the Government's rights and never with the Government's liabilities, perhaps it is less concerned with such consistency than courts of broader jurisdiction.

If the United States had requisitioned petitioner's wine in December, 1943, the United States would have paid him only 28 cents a gallon for it, and if he had sued to get more he would have lost. *United States v. Commodities Trading Corp.* (1950), 339 U.S. 121; *United States v. John J. Felin & Co.* (1948), 334 U.S. 624. If the United States had taken the winery as well as the wine, these cases make it clear that petitioner would still have received only 28 cents a gallon for his wine. In these circumstances, there is something unpalatable about the spectacle of the United States contending that for tax purposes a contract selling the wine for 28 cents a gallon is so unreasonable that it must be upset, because for tax purposes the wine had a value in excess of 28 cents a gallon.

It is quite clear that if petitioner had pointed to contract bottling methods and sales of wine-cum-winery as justification for his claim that he should receive more than ceiling price for requisitioned wine, he would have been unsuccessful in getting more than 28 cents a gallon. Similar arguments were advanced and proved unavailing in the Supreme Court cases cited above.

The equities in favor of the citizen gave the Supreme Court trouble. In the *Felin* case (1948, 334 U.S. 624), the requisitioned goods had cost the citizen more than the ceiling price, and for this reason he had refused to make any more sales to the Government. The Government thereupon requisitioned the goods and tendered the ceiling price. The Court of Claims held in the citizen's favor, but the Supreme Court[31] reversed, requiring three separate opinions by as many justices to state the reasons for the reversal.

The next case gave the Supreme Court an opportunity to clarify its position, and it did so. This case, the *Commodities Trading* case (1950, 339 U.S. 121), found Mr. Justice Frankfurter, author of one of the prevailing opinions in the *Felin* case, in dissent. Here the equities in favor of the citizen were even stronger than in the *Felin* case.

In the *Commodities Trading* case, the War Department had requisitioned 760,000 pounds of whole black pepper and wanted to pay Commodities the OPA ceiling price of 6.63 cents per pound. Commodities claimed that it was entitled to receive 22 cents per pound and instituted suit in the Court of Claims for that figure. The Court of Claims fixed just compensation at 15 cents per pound, this representing an amount more than double the OPA ceiling price.

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[31]After argument, and reargument at the next term, by Acting Solicitor General (now Circuit Judge) Washington. Plainly the case was thought important by the Government.

The Court of Claims rested its decision upon what it termed the "retention value" of the commodity. According to the Supreme Court, the Court of Claims "also considered how much the precise pepper requisitioned cost Commodities, the prices at which that company sold pepper after the government requisition, subsequent OPA ceiling prices, and the average price of pepper for the past 75 years." (339 U.S. 121, at 123.) The Supreme Court reversed, and held that the ceiling price for black pepper was the just compensation to which Commodities was entitled under the Constitution when its property was requisitioned by the Government. The Court stated (339 U.S. at 123) that the question before it was whether the fair market value test which was normally applied in case of a free market was applicable where there was not a free market because of government price controls. After some discussion, the Court stated (339 U.S. at 124):

> "Thus ceiling prices of commodities held for sale represented not only *market value* but in fact the only value that could be realized by *most* owners. Under these circumstances they cannot properly be ignored in deciding what is just compensation." (Emphasis added.)

After further discussion, the Court also said (339 U.S. at 128):

> "But the ceiling price of pepper, fair and just to the trade generally, should be accepted as the maximum measure of compensation unless Commodities has sustained the burden of proving special conditions and hardships peculiarly applicable to it."

Thereafter the Court rejected Commodities' contention that the retention value to the pepper for which Commodities contended was a special circumstance which would avoid the application to it of the general rule. Then the Court passed to the next contention (339 U.S. at 129):

> "Another contention is that the particular pepper turned over to the Government cost Commodities more than the ceiling price, and that this is a special circumstance sufficient to preclude use of the ceiling price here. The Court of Claims did find that the average cost to Commodities of the precise pepper taken, including labor costs, storage, interest, insurance, taxes and other expenses, was 12.7 cents per pound. * * * (The Government challenged these findings on various grounds.) * * * We do not consider these contentions of the Government because we think that the cost of the pepper delivered provides no sufficient basis for specially excluding Commodities from application of the ceiling price. *The general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price.* (Citation omitted.) The reasons underlying the rule in cases where no Government-controlled prices are involved also support its application *where value is measured by a ceiling price.*" (Emphasis added.)

We submit that it is apparent that arguments that sharp practices were available whereby overceiling prices might be obtained would have failed to move the Supreme Court from its view that ceiling prices establish fair market value. It is also significant that, as will appear from the foregoing quotations, the Supreme Court accepted as a premise and even reaffirmed its earlier decisions that market value, where ascertainable, is the measure of just compensation.[32]

The Tax Court's stated reason for not applying these cases here is not enlightening. It is (R. 78) "There is no factual basis here for the application of the cases." If the Tax Court meant to refer back to its earlier statement (R. 77) that there was no ceiling price on the sale because it was part of the sale of a business, its distinction of the *Felin* and *Commodities Trading* cases is unsound, for two separate reasons. First, there was no OPA ceiling price applicable to the transactions involved in those cases either. Because the Constitution fixed the price of requisitioned property at "just compensation," which means "market value," no OPA regulation could directly apply to it. Second, the Tax Court is wrong in its belief that this sale was exempt from the ceiling on wine. It is to be noted that OPA did not so rule. It gave no ruling at all on petitioner's sale. The Tax Court's belief is based on its own interpretation of an OPA ruling in 1942, as interpreted in the stipulated opinion of a former OPA attorney (Stipulation of testimony of Frank Sloss; not printed), and a letter ruling dated April 6, 1944 from an OPA price attorney about another sale. (Exh. V; not printed.)[33] Both the letter and the stipulated testimony emphasize that the

[32]*United States v. Causby* (1946), 328 U.S. 256; *United States v. Miller* (1943), 317 U.S. 369. "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken * * *. Market value fairly determined is the normal measure of the recovery." *United States v. Causby*, 328 U.S. at p. 261.

[33]Sloss: "I have been asked for my opinion on the question whether any maximum price was applicable to a sale of a quantity of wine in bulk * * * where the sale was a part of and in connection

sale, to be exempt, must be one of an entire business, including all its assets. The Tax Court's interpretation of the ruling as applicable here is wrong, because the bottling plant and store where the retail end of the business was conducted were specifically excepted from the sale. (R. 46.) Petitioner could have had no assurance of freedom from prosecution or penalty if he had known about this ruling and had sought to rely on it.

In any event, the market value as established by ceiling prices cannot be so lightly waved aside. If possibilities of obtaining overceiling prices are irrelevant in determining market value where the Government's obligations are involved, so should they be when its rights are involved.

There is a recent indication that the decision below may not represent the views of the entire Tax Court.[34] More recently, in *L. E. Shunk Latex Products, Inc.* (1952), 18 T.C. No. 121, the Tax Court held that it could not approve a reallocation of income under Section 45 where the effect

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with the sale of a winery as a going business * * *. In my opinion such a sale was not subject to any maximum price.

* * * * * * *

"The foregoing opinion is limited to the situation in which an inventory of wine is sold as a part of the sale of the winery as a going business. It does not apply to the sale of a quantity of wine in bulk apart from the sale of a going business."

Letter ruling: "We advise that the sale of a going business is excluded from price control. In such case, however, there must be a sale not only of, for example, the wine, but also of the equipment, physical assets, and good will. If the sale is made of the wine as a separate item, then there are price regulations which do apply to such sale."

[34]This decision below was not reviewed by the full Tax Court and is only a memorandum decision. The Tax Court attaches no precedential effect to a memorandum decision. *Lucille McGah* (1952), 17 T.C. 1458, 1459, on remand from *McGah v. Com'r* (C.A. 9, 1952), 193 F. 2d 662.

would be to allocate more income to one corporation than it could have realized under the ceiling prices established by OPA. It specifically stated that but for the ceilings it would have approved the reallocation.

We submit that the more recent view of the Tax Court is the correct one. It cannot reallocate income on a basis which rejects the controlling effect of ceiling prices.

CONCLUSION.

Error committed at the trial requires a reversal and remand. However, even on the record made below there is no legal foundation for the ultimate decision below, so that it should be reversed with instructions to find for petitioner on the disputed tax issue.

Dated, San Francisco, California,
February 24, 1953.

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